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Nos. 86-495, 86-624, and 86-625

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

K MART CORPORATION,
Petitioner
v.
CARTIER, INC., *et al.*

47TH STREET PHOTO, INC.,
Petitioner
v.
COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS, *et al.*

UNITED STATES OF AMERICA, *et al.*
Petitioners
v.
COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE CONSUMERS UNION OF U.S., INC. IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE CONSUMERS UNION OF U.S., INC. IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

Consumers Union of U.S., Inc.[1] ("Consumers Union") has obtained consent from all the parties to this case to submit this brief, and it has filed the consent letters with the Clerk of the Court.

Consumers Union is a non-profit membership organization that regularly engages in consumer advocacy before the executive, judicial, and legislative branches of government. A longstanding part of Consumers Union's advocacy on behalf of consumers has been related to the promotion of competition in the marketplace. With this goal in mind, Consumers Union has repeatedly acted to help rationalize markets by ensuring the availability of information about goods and services. In the international trade area, it has promoted the reduction of tariff barriers, quotas, limitations on parallel imports and other devices that prevent consumers from availing themselves of the advantages of international interbrand and intrabrand competition. (Consumers Union carried an article on parallel imports in its May, 1985, issue of *Consumer Reports Magazine.)*

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[1]Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education and counsel about consumer goods and services and the management of family income. Consumers Union's income is derived solely from the sale of *Consumer Reports,* its other publications and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports,* with approximaely 3.5 million paid ciruclation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial, and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

Many of Consumers Union's members purchase imported cameras, watches, home electronic devices and other goods that are imported through parallel channels and, thus, receive the benefits assured by the Customs Service's regulation, 19 C.F.R. section 133.21(c)(1)-(3) ("the Regulation"), which is at issue in this case.

SUMMARY OF ARGUMENT

The Regulation provides great benefits to consumers in the form of lower prices and greater product choice. It enhances intrabrand competition, which is of great importance in maintaining low consumer prices where there is imperfect interbrand competition due to market structure, strong consumer brand preference, or other factors.

The attempt by the Coalition to Preserve the Integrity of American Trademarks ("COPIAT") to discredit the Regulation on the basis of antitrust principles is misdirected. The case law applicable to vertical restraint agreements does not apply to the situation addressed by the Regulation because the Regulation does not invalidate vertical restraints. Rather, it applies to third parties who are not parties to any vertical restraint agreement. In soliciting the United States government to impede the free flow of goods bearing genuine trademarks into this country, COPIAT is urging the government to create a territorial marketing division between the United States and the rest of the world. The same purpose and result of such an action would be achieved by a horizontal marketing restraint, which would be *per se* illegal under our antitrust laws. COPIAT's request for this type of governmental interference in world markets should be denied because it violates traditional American antitrust principles.

Congress ratified the Regulation's distinct treatment of a U.S. trademark owner that is affiliated with the foreign trademark owner when it passed the Lanham Trademark Act of 1946. Additionally, the only way to make sense of both section 42 of the Lanham Act and section 526 of the Tariff Act of 1930 is through the interpretation reflected in the Regulation.

ARGUMENT

This Court has indicated that an important factor in determining the validity of an agency regulation is the strength of the reasoning it reflects.[2] Under this criterion, the Regulation at issue here should be preserved because it implements sound antitrust policies that accrue to the benefit of the United States economy and to American consumers.

I. THE REGULATION SHOULD BE PRESERVED BECAUSE IT REFLECTS SOUND ANTITRUST PRINCIPLES

A. Consumers Benefit Greatly From Parallel Imports

The great benefits consumers derive from parallel imports are the lower prices and the abundance of product choices that result from a competitive marketplace. These benefits are evident by looking at parallel imports in the U.S. marketplace.

Parallel importers often are able to purchase products from authorized distributors abroad and resell them in the United States at prices significantly below those set by

[2] *Federal Election Comm. v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981); *Skidmore v. Swift and Co.*, 323 U.S. 134 (1944).

retailers working through authorized United States distributors. This reflects the great disparity in prices set by the foreign and domestic distributors.

One example of the reduced retail price that results from parallel importing is reflected in the products offered by 47th Street Photo. Because of a $272 difference in wholesale price, a Hasselblad 150 millimeter F4CF lens generally retailed in the United States in 1986 for about $1,100 while 47th Street Photo sold it for $849.[3] The U.S. distributor's suggested retail price for a Tokina 35-200 millimeter camera lens in 1986 was $239.15. 47th Street Photo sold the lens for $219.[3a]

Beside lower prices for identical products, consumers are also provided a greater selection of merchandise because of the role played by parallel imports. Parallel importers are able to purchase products from authorized foreign distributors that are simply not available from U.S. distributors. For example, at one time Vivitar made a newly developed slide printer available only to its foreign distributors. United States consumers were only able to obtain the product through parallel importers.[4]

COPIAT has suggested that American consumers are harmed by parallel imports because the imports can be damaged when they are put on the American market through unauthorized channels.[5] The erection of an unconditional barrier to parallel imports is certainly an overly-broad

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[3]Joint Appendix (JA) on Appeal at 2. *See also* Appendix B to Comments filed by the Bureaus of Competition, Consumer Protection, and Economics of the Federal Trade Commission in opposition to U.S. Custom Service proposal to "demark" parallel imports (Oct. 17, 1986).

[3a]JA on Appeal at 3.

[4]JA on Appeal at 9.

[5]COPIAT's Opening Brief on Appeal at 9.

remedy to such hypothetical claims, even if COPIAT could substantiate that they occur to any significant degree. Even if consumers were not adequately protected against this potential harm by implied rights of merchantability and by statutory prohibitions against deceptive and unfair practices, a more direct remedy that is not anticompetitive could be devised.

COPIAT has also suggested that consumers are harmed by parallel imports because they purchase such products under the mistaken belief that they are sold under manufacturer's warranty and with English language instructions.[6] To the extent consumers are misled regarding the applicability of a disclosed manufacturer's warranty, however, this can be corrected by COPIAT members themselves. Because foreign-manufactured products intended for sale abroad may make their way into the United States, the manufacturer has the responsibility to honor any stated warranty claims or to make it clear that its warranty guarantees are not applicable to purchases in the United States. To the extent consumer reliance may be reasonably based on false representations by the parallel importer, the consumer also has recourse to consumer protection statutes and the common law remedies against fraud and misrepresentation.

In sum, consumers receive the benefit of price competition and product diversity because of the Regulation allowing parallel imports. Any potential consumer harm associated with parallel imports is not created by the Regulation itself and elimination of the Regulation is an overbroad means to address it.

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[6] *Id.;* COPIAT's Reply Brief on Appeal at 8.

B. The Regulation Prevents Anticompetitive Conduct That Has No Counterpart In Cases Applying The Rule Of Reason Test To Vertical Restraints

So long as the domestic trademark holder is affiliated with the foreign manufacturer, the Regulation permits any person to import articles bearing the genuine trademark. The Regulation thereby enhances intrabrand competition, which is of particular importance to maintaining low consumer prices where there is imperfect interbrand competition due to market structure, strong consumer brand preferences maintained through genuine or artificial product differentiation or for any other reason.

COPIAT has argued, however, that reliance on antitrust doctrines to justify the Regulation is unsound because they have been "discredited and repudiated."[7] In support of this overly-broad propositon, COPIAT has argued that, in some cases, vertical restraints on competition can have procompetitive effects, citing *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977). However, the *G.T.E. Sylvania* case has been misapplied by COPIAT and by the Court below.

G.T.E. Sylvania substituted a rule of reason test for the formerly used *per se* test in vertical restraint cases. Consumers Union agrees with the principle set forth there that, in certain circumstances, vertical restraints can increase interbrand competition and serve generally to benefit consumers. 433 U.S. at 54-56. However, it does not follow that the Court's ruling in that landmark case negates the

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[7]COPIAT's Opening Brief on Appeal at 68. COPIAT has also suggested that antitrust liability cannot arise as a result of agreements between affiliated companies. *Id.* at 63. This is a plainly false proposition. *See* note 10 *infra*.

general validity and wisdom, in terms of antitrust principles, of the Regulation. Nor does it follow that the government should make it *per se* unlawful to engage in parallel importation, thus putting an insurmountable burden on the party seeking to compete instead of leaving to the party seeking to restrain competition the burden of doing so.

G.T.E. Sylvania and its progeny address situations in which manufacturers have imposed restrictions on their authorized distributors or retailers. For example, in *G.T.E. Sylvania,* the manufacturer limited the location from which authorized retailers could sell its product. When the manufacturer denied the request of one retailer to open a second outlet from which to sell the product, the retailer proceeded to do so in violation of the vertical restriction. When sued, the retailer raised an antitrust counterclaim.

In reversing the applicability of the *per se* test, this Court addressed only the competitive implications of the vertical restriction itself. It did not address the question of whether a *third* party, independent of the parties to the distribution agreement, could resell the product in the territory that the manufacturer had assigned to another authorized retailer. Nor have third party restrictions been at issue in rule of reason cases subsequent to *G.T.E. Sylvania.*

Thus, this case presents the Court with the third party restraint issue for the first time. The analogy of parallel distribution to the direct vertical restraint cases applies only to the relationship between the foreign manufacturer and its distributors. If, by imposing vertical restraints the manufacturer tried to limit the distribution of the trademarked product in the United States to authorized U.S. dealers, this would parallel the situation in *G.T.E.*

Sylvania.[8] However, the Regulation does not prevent this type of vertical restraint. Consequently, *GTE Sylvania* has no direct bearing on the Regulation's soundness in terms of antitrust principles.

C. The Regulation Prevents COPIAT Members From Achieving The Same Purpose And Effect Produced By Horizontal Marketing Restraints, Which Are *Per Se* Illegal Under Our Antitrust Laws

Rather than prohibiting vertical restraint agreements, the Regulation prevents COPIAT members from realizing the same purpose and effect produced by horizontal marketing restraints, which are *per se* illegal under United States antitrust laws. As with all practices to which a *per se* rule applies, the action COPIAT requests is so anticompetitive that it should be resoundingly denied even if COPIAT could point to certain circumstances in which its anticompetitive effects were minimal or nonexistent.[9]

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[8]Indeed, if this case involved a challenge to vertical restraints imposed by the foreign affiliates of COPIAT's members, a rule of reason analysis would apply. In the context of that type of case, but not here, a COPIAT member as defendant could legitimately broach the arguments it has attempted here regarding the interbrand competition that might be spurred by elimination of intraband competition. But here, where the effort is to eliminate the possibility of any intrabrand competition for all trademarked products through the erection of a territorial wall, this type of "defense" should be dismissed out of hand. *See* note 9 *infra.*

[9]In *Northern Pacific R. Co. v. U.S.*, 356 U.S. 1, 5 (1958), this Court explained the appropriateness of, and the need for, *per se* rules: "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." In *U.S. v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972), this Court also stated: "In applying these rigid rules, the Court has consistently rejected the notion that naked

In soliciting the power of the United States government to impede the free flow of goods into the United States market, COPIAT is asking the government to create a division of customers and territories, a division between the United States and the rest of the world. This would allow United States manufacturers and distributors to control the quantity and price of the product within the United States without the threat to them of any intrabrand competition. The same anticompetitive purpose and result would be achieved if the United States manufacturer or distributor entered into an horizontal agreement with its foreign counterpart under which each were obligated to sell only to distributors or retailers that would keep the final sale of the product within each party's respective territory.

The horizontal agreement cases traditionally addressed by United States antitrust law involve agreements among competitors[10] to divide markets among themselves to eliminate intrabrand competition. The same purpose and effect is no less harmful if it is achieved through governmental action.

This type of division has long been considered *per se* illegal because it eliminates intrabrand competition.[11] It can

restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition." (citations omitted)

[10]Corporate affiliates may be deemed "competitors"in the horizontal market division cases. In *Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593 (1951), this Court applied the *per se* rule to a horizontal world market division involving trademarked products and corporate affiliates. *See U.S. v. Citizens and Southern National Bank*, 422 U.S. 86, 116 (1975).

[11]"This Court has reiterated time and again that '(h)orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling competition." 405 U.S. at 608. (citation omitted) The *per se* rule applies whether territories, customers, or product markets are divided. 405 U.S. 596.

even effect interbrand competition by thwarting downward pressures on prices. Thus, the Regulation comports with basic antitrust principles by avoiding governmental action that would have the same purpose and effect as that which is *per se* illegal among competitors.

D. Parallel Imports Stimulate Competition in Several Ways

The third party sellers that COPIAT would restrict create healthy competition and product diversity in the United States. They legally purchase the genuine trademarked goods overseas. Where the products sold through authorized channels are also manufactured abroad, presumably the manufacturing costs are the same for both authorized and parallel imports.[12] Still, the third parties are often able to resell parallel imports at a price below the "authorized" price. This very fact demonstrates the importance to healthy competition of permitting parallel imports to continue under the Regulation. Even where the retail price differentials are minimal or nonexistent, the presence of parallel imports lowers the general market price that would otherwise prevail.

If part of the price differential can be accounted for by the provision through authorized dealers of associated services[13] (e.g., product demonstration, preparation, repair or greater return privileges), the consumers who purchase

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[12]Where the authorized sales involve goods manufactured in the United States, domestic production costs may be higher than foreign, but there is no sound basis for denying consumers the benefit of lower prices produced by lower manufacturing costs.

[13]The assertion that the disparity in prices merely reflects differences in associated services was challenged below.

the parallel goods are merely demonstrating their preference for a lower price over such services. To the extent that such "services" may involve a manufacturer's warranty, rather than no warranty or a retailer's warranty, or English language operating or maintenance instructions, then so long as consumers are informed of the lack of these services, their selection of the parallel import is simply an expression of preference for lower price over greater service. The availability of such options should serve to enhance both intrabrand and interbrand competition.

In summary, the Regulation should be preserved and COPIAT's request for governmental interference in world markets should be denied because the regulation is soundly based on traditional antitrust principles.[14] The very survival of the discount market for goods that may be parallel imported depends on the Regulation. Parallel imports are an incentive against artificially inflated prices for products subject to the Regulation. They give consumers a choice between lower prices and product-related services. Price competition and consumer choice are basic elements of the market model which our most basic federal policies assume. This Court should reverse the decision below in order to uphold and preserve this policy.

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[14]Section 33(b)(7) of the Lanham Act itself indicates that the Act is to be reconciled with the antitrust laws. It states that a registered, uncontestable trademark is conclusive evidence of the holder's exclusive right to the use of the mark in commerce unless, *inter alia*, "the mark has been or is being used to violate the antitrust laws of the United States." 15 U.S.C. section 1115(b)(7). In *Timken*, this Court stated: "A trademark cannot be legally used as a device for Sherman Act violations." 341 U.S. at 599.

II. IN ITS ENACTMENT OF THE LANHAM ACT IN 1946, CONGRESS SANCTIONED THE AGENCY'S IMPLEMENTATION OF SECTION 526; ADDITIONALLY, THE REGULATION INTERPRETS THE LANHAM ACT AND SECTION 526 IN THE ONLY WAY THAT GIVES MEANING TO BOTH

COPIAT has ignored the fact that the Lanham Trademark Act of 1946 was passed after the Treasury Department had already issued the 1936 regulations that interpreted section 526 and a related precursor to section 42 of the Lanham Act[15] in the same way that is being challenged in this case.[16] Hence, Congress ratified the Regulation in passing the Lanham Act without amending either section. Moreover, even if this Court accepts COPIAT's assertion that the 1936 regulations were only intended to implement the precursor to section 42 of the Lanham Act,[17] then Congress' ratification of that interpretation still supports the Regulation as a valid implementation of section 526. This is because section 42 of the Lanham Act makes no sense, and is, in fact, nullified, if COPIAT's literal interpretation of section 526 prevails.

Section 42 of the Lanham Act, which prohibits the entry of goods that "copy or simulate" a trademark registered in the United States, is undeniably related to section 526.[18]

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[15]Section 27 of the Trademark Act of 1905.

[16]The Treasury Department made it clear in issuing the 1936 regulations that they applied both to sections 526 and to what later became section 42 of the Lanham Act. T.D. 48,537 (1936), JA 27.

[17]COPIAT's Reply Brief on Appeal at 13.

[18]Indeed, COPIAT contradicts itself by ridiculing the notion that the 1936 regulation applied to both sections when it later states, "If Section 42 has a reach different from that of Section 526, the agency has never explained why there is a difference or just what the difference is." COPIAT's Opening Brief on Appeal at 73.

Not only does section 42 limit itself by explicit reference to section 526,[19] but it addresses the same subject matter. On its face, and with the judicial gloss of *A. Bourjois and Co. v. Aldridge,* 263 U.S. 675 (1923), it prohibits imports that bear the same trademarks as those registered by U.S. trademark owners.

Even COPIAT must surely concede that, by failing to invalidate the 1936 regulations in passing the Lanham Act in 1946, Congress ratified the regulations as the correct interpretation of section 42. Congress, then, must have also ratified the regulations as the correct interpretation of section 526 because any other analysis would make no sense. It would be incongruous if section 42 allowed the importation of goods bearing United States trademarks under certain circumstances but section 526 prohibited them unconditionally. The Regulation interprets section 526 in a way that gives meaning to both.

[19]Section 42 begins, "Except as provided in subsection (d) of Section 526 of the Tariff Act of 1930, . . ."

CONCLUSION

For the foregoing reasons, the decision of the Circuit Court of Appeals should be reversed and this case should be remanded to the District Court with instructions to dismiss the complaint.

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